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IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
7/11/2017
DEANA WILLIAMSON, CLERK

EX PARTE	§	
	§	NO. PD-0208-16
RICHARD MARK BOWMAN	§	

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

I.

PROCEDURAL HISTORY

On June 28, 2017, this Court reversed the judgment of the First Court of Appeals and held that trial counsel, Ned Barnett, was not ineffective in failing to impeach officer William Lindsey with payroll records reflecting the extraordinary amount of overtime pay he received for testifying in DWI trials to show his motive to make unjustified arrests. Judge Alcala, joined by Judge Richardson, dissented. Bowman moves for rehearing pursuant to Rule of Appellate Procedure 79.1.

II.

GROUNDS FOR REHEARING

1. The majority failed to consider that the trial judge could disbelieve Barnett's testimony that he did not remember whether he obtained Lindsey's payroll records.

2. The majority's holding precludes trial judges from disbelieving any witness who claims to have memory loss, including defendants who testify falsely that they do not remember an event, and effectively insulates trial counsel from an ineffective assistance claim as long as he testifies that he does not remember the matter in question.

3. The majority's conclusion that the record does not support the trial court's finding that Barnett did not obtain Lindsey's payroll records is clearly erroneous and, in any event, is irrelevant given Barnett's testimony that, even had he obtained the records, he would not have used them to impeach Lindsey.

4. Barnett was ineffective regardless of whether he obtained Lindsey's payroll records.

III.

REASONS WHY REHEARING IS REQUIRED

1. Barnett's Dilemma

Ned Barnett faced a dilemma when he testified at the writ hearing. He knew that he did not obtain officer Lindsey's payroll records before Bowman's trial. They were not in the file that he provided to habeas counsel. Moreover, he had no reason to obtain them in view of his admission that, no matter what they revealed, he would not use them. Had he told the truth and admitted that he did not obtain them, he would have been found to be ineffective for failing to conduct an adequate

investigation. Had he admitted that he would have used them if he had them, he would have been found to be ineffective for failing to impeach Lindsey. So he did what all trapped witnesses do—he hid behind the impenetrable claim, "I don't remember." The majority's holding that the trial court had no factual basis to find that he did not obtain the records ignores that the judge could disbelieve his claimed loss of memory.

2. The Majority's Holding Is Contrary To Bedrock Precedent That A Trial Court Can Disbelieve Any Part Of A Witness's Testimony.

Bowman's ineffective assistance of counsel ("IAC") claim is based, in part, on the premise that Barnett could not make an informed decision not to impeach Lindsey with payroll records that he did not obtain. Ex parte Bowman, 483 S.W.3d 726, 738-41 (Tex. App.—Houston [1st Dist.] 2014, pet. granted); see Wiggins v. Smith, 539 U.S. 510, 522-23, 527 (2003) (reviewing court's "principal concern" is not whether counsel's challenged conduct was strategic, but "whether the investigation supporting [his] decision . . . was itself reasonable . . . . Strickland does not establish that a cursory investigation automatically justifies a tactical decision . . . ."). The majority rejected the trial court's finding that Barnett did not obtain Lindsey's payroll records. "The record does not bear out the [trial] court's finding that Barnett failed to obtain and review those records to begin with." Maj. Op. 23. With this broad, albeit erroneous, brush stroke, the majority ignores the most basic tenet of appellate review in a manner so far outside the mainstream that rehearing is

required.[1]

"Trial judges, unlike their appellate court counterparts, are uniquely situated to 'observe firsthand the demeanor and appearance of a witness.'" Wiede v. State, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). "Consequently, a trial judge 'is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given to their testimony . . . .'" Id. at 24-25. "Just as a jury may 'believe all, some, or none of the testimony,' so may a trial judge believe all, some, or none" of it. Cf. Charles v. State, 146 S.W.3d 204, 213 (Tex. Crim. App. 2004).

The trial judge, after observing Barnett testify at the writ hearing, clearly did not believe his claimed loss of memory. See Chambers v. State, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991) (fact-finder can disbelieve witness's assertion that she "didn't know" in response to prosecutor's questions about recantation). The majority usurped the trial judge's role as the arbiter of Barnett's credibility and jettisoned this fundamental tenet of appellate review in the process. Confronted with two different narratives in the face of Barnett's claimed memory loss—either he obtained the records or he did not—the judge acted within his discretion in finding that he did not.

This Court can reject a trial court's fact-finding that is clearly erroneous.

[1] It is telling that the State has never contended at any stage of the proceedings that the trial court's finding is not supported by the record.

However, the Supreme Court has cautioned, "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. Bessemer City, 470 U.S. 564, 574 (1985). The majority's rejection of the trial court's fact-finding is clearly erroneous and undermines its ultimate holding.

The majority also ignores the import of Barnett's admission that, had he obtained the records before trial, he would not have used them to impeach Lindsey. Maj. Op. 12. Why would Barnett obtain Lindsey's payroll records in the first instance if he would not use them for impeachment? Barnett had no reason to engage in a useless act by obtaining payroll records that he would not use. See White v. State, 916 S.W.2d 78, 82 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (law does not require performance of useless act). Barnett's admission that he would not have used the records supports the trial court's finding that he did not obtain them.

The majority did not honor the trial judge's right to disbelieve a witness's claimed memory loss. It failed to address why Barnett would have obtained records that he would never use. Rehearing is required to resolve these issues.

3. The Majority's Holding Is Problematic.

The majority's holding is problematic. If trial judges cannot disbelieve a witness's claimed memory loss, they cannot disbelieve defendants who testify falsely that they do not remember an event. Moreover, the majority effectively insulates trial counsel from an IAC claim as long as he testifies that he does not

remember the matter in question—even if that testimony is false—by preventing the trial judge from disbelieving his claimed loss of memory. Indeed, the majority opinion will serve as a primer for appellate and post-conviction writ prosecutors to inform trial counsel that, if he testifies that he does not remember the matter in question, the trial court must accept his response and cannot conclude that he was ineffective. The only way to ensure that trial judges can disbelieve a witness's claimed loss of memory, in light of the majority opinion, is to grant rehearing and reaffirm this fundamental principle.

4. Barnett's Refusal To Admit That He Did Not Obtain Lindsey's Payroll Records Is A Red Herring.

The majority's rejection of Bowman's IAC claim turns on its conclusion that, because Barnett failed to acknowledge that he did not obtain Lindsey's payroll records, the trial court's finding that he did not obtain them is not supported by the record. Maj. Op. 23-24 ("In the absence of evidence to show—one way or the other—whether Barnett had obtained the records, Appellant cannot overcome the Strickland presumption of adequate investigative assistance."). The majority's reliance on Barnett's "failure to confess" is the ultimate red herring; a classic "straw-man" argument that cannot support the great weight rested upon it. See Ex parte Brister, 801 S.W.2d 833, 838 (Tex. 1990) (Gonzalez, J., *dissenting*); Reynolds v. State, 4 S.W.3d 13, 16 (Tex. Crim. App. 1999) (referring to "a classic example of setting up a straw man and then knocking it down.").

A criminal defense lawyer defending a DWI involving Houston Police Department DWI Task Force officers in 2004-05 either routinely obtained their payroll records in every case or never did, depending on whether he recognized the potential impeachment value. If he did not care what the records showed because he would not use them for impeachment, he had no reason to obtain them. Thus, Barnett's claimed loss of memory was not credible. If the trial court could not find that he did not obtain the records, it could not find that he did obtain them. If his claimed loss of memory prevented the trial court from finding whether he obtained the records—which would be absurd—then any such finding is irrelevant.

At the end of the day, it does not matter whether Barnett obtained Lindsey's payroll records. As Judge Alcala wrote, laying bare the Achilles' Heel of the majority opinion:

> But it appears to me that counsel's performance was inadequate as to the payroll records whether or not he had actually obtained and reviewed them prior to trial. On the one hand, if the evidence showed that counsel had obtained and reviewed the payroll records, then he should have actually used those records more effectively to defend appellant at trial with the evidence that the arresting officer had a financial bias. On the other hand, if the evidence showed that counsel had not obtained and reviewed the payroll records, then, as the court of appeals determined in its analysis, that would reveal that counsel's investigation was inadequate in this respect. However you slice it, whether he did or did not obtain payroll records, counsel's performance was deficient with respect to his handling of the payroll records.

Diss. Op. 4 (Alcala, J., *dissenting*).

Nothing more need be said. Rehearing is required.

5. The Court Should Dismiss The Petition As Improvidently Granted Or Allow Oral Argument.

The State has never contended that the record does not support the trial court's finding that Barnett did not obtain Lindsey's payroll records. The Court of Appeals did not address, much less decide, this issue. Yet the accuracy of this finding is the linchpin of the majority opinion.

The Court of Appeals applied well-settled caselaw to uncontradicted facts. This Court typically refuses to exercise its discretionary review authority in cases of this nature.[2] The State's PDR was improvidently granted insofar as the merits of the IAC claim are concerned. See Arcila v. State, 834 S.W.2d 357, 361 (Tex. Crim. App. 1992). If the Court does not want to address the laches issue, it should grant rehearing and dismiss the State's PDR as improvidently granted.[3]

This Court denied Bowman's request for oral argument. Bowman easily could have explained during oral argument that the trial court's finding is supported by the record because a trial judge can disbelieve a witness's claimed loss of memory and that Barnett had no reason to obtain records that he would never use. The State

[2] MCMINN, Petitions for Discretionary Review, Ch. 35, 2013 Advanced Criminal Law Course at 4 ("In a nutshell, the Court is looking for issues that are important to the jurisprudence of the State. The Court's primary role is not to correct every mistake made by the courts of appeals. As the court of last resort, its role is to be the caretaker of Texas criminal law.").

[3] Bowman soundly defeated the State's laches claim at the remand hearing, and the Court of Appeals so found. Bowman, 483 S.W.3d at 733-38.

did not challenge this finding in any of its briefs. The Court of Appeals did not consider the issue, which first arose in the majority opinion.[4] The integrity of the appellate process requires that the Court grant rehearing to allow Bowman to respond to an issue that he previously did not need to address.

VI.

CONCLUSION

This Court should grant rehearing; vacate its opinion; and dismiss the State's PDR as improvidently granted, affirm the judgment of the Court of Appeals, or schedule oral argument.

Respectfully submitted,

/s/ Brian Wice
Brian Wice
State Bar No. 21417800

440 Louisiana, Suite 900
Houston, Texas 77010
(713) 524-9922
(713) 236-7768 (facsimile)
wicelaw@att.net

/s/ Randy Schaffer
Randy Schaffer
State Bar No. 17724500

1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
noguilt@swbell.net

Attorneys for Appellant
RICHARD MARK BOWMAN

[4] It is ironic that, the same day this Court denied Bowman relief, it acknowledged in another case the "general rule that [it] does not address issues on discretionary review that the Court of Appeals did not decide on direct appeal." Burks v. State, No. PD-0992-15 (Tex. Crim. App. June 28, 2017) (Richardson, J. *dissenting*) (not designated for publication) Diss. Op. 5. Judge Yeary, who authored the majority opinion in Bowman's case, has made the same observation. See Smith v. State, 463 S.W.3d 890, 900 (Tex. Crim. App. 2015) (Yeary, J., *concurring and dissenting*). The majority ignored this rule in Bowman's case.

CERTIFICATE OF SERVICE

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/s/ Randy Schaffer
Randy Schaffer

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Randy Schaffer